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July 29, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, DC 20554

RE: Access Charge Reform, CC Docket No. 96-262; In the Matter of Petition of the SBC Companies for Forbearance From Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs, CC Docket No. 98-227.

Dear Ms. Salas:

In regard to the above listed dockets, a number of ex parte communications have recently been filed. Namely, the HAI Study placed on the record by the Association for Local Telecommunications Services (ALTS) and opinions expressed by Intermedia Communications in a July 14, 1999 ex parte position paper regarding alleged cost-price squeezes and discriminatory performance standards. Yesterday, July 28, 1999, several CLEC executives at an ALTS meeting made public statements asking the Commission to further delay any decision on price cap LEC pricing flexibility. All of these submissions and pronouncements contain unfounded allegations and groundless conclusions. One consistent error in these materials is that they all tend to presume "guilt" or "bad actor" status for the price cap local exchange carriers. In this response, SBC Communications Inc. demonstrates that no such presumption should be undertaken by the Commission. Further, there are other compelling reasons to disregard these materials and to proceed to address the subjects of price cap carrier pricing flexibility and the Petitions of the price cap carriers for forbearance, in the upcoming August 5 open meeting.

1. Forbearance From Regulation Should Be the *Desired* Result Of A Forbearance Proceeding

In a Dissenting Statement issued on January 29, 1999 in connection with In the Matter of Policies and Rules Concerning the Interstate Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act; Petitions for Forbearance, FCC Dkt. No. 98-347,[1] Commissioner Michael Powell describes a proper standard for the review and determination of petitions for forbearance in general under the 1996 Act. The premise of his Dissenting Statement is that forbearance from regulation should be the *desired* result of a forbearance proceeding, and that the burdens of proof should be assigned

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[1] 1999 FCC LEXIS 400.

accordingly. Under this standard, the SBC Petition for Forbearance ("Petition") must be granted.

a. Petitions for Forbearance enjoy an Implicit Presumption of Validity

As Commissioner Powell points out, if a petition for forbearance is filed, and the Commission takes no action within one year (or one year plus 90 days), it is *automatically deemed granted*. This is a clear expression of Congressional intent that the filed petition is essentially a prima facie case for forbearance that the opponents to forbearance and/or the Commission must overcome in order to justify a denial of forbearance. SBC has filed a detailed, supported Petition for Forbearance and has supplied additional evidence in its Reply Comments. It is up to SBC's opponents to do more than complain of "issues" with or "insufficiencies" of SBC's evidence. They must come forward with evidence of their own that refutes SBC's position. The question is not "whether forbearance is warranted, but whether the challenged regulation is warranted any longer."[2] And, "if it is not, forbearance is mandated as a matter of law."[3]

An analogy may be drawn to a summary judgment proceeding in state or federal court. The movant files' evidence and argument establishing its right to prevail as a matter of law, based upon the undisputed material facts. The respondent must raise fact issues (or winning legal arguments) in order to defeat the motion, but the fact issues must be enough to establish that one element of the movant's claim or defense is defeated such that the entire claim or defense is defeated. It is not enough to "pick" at pieces of the evidence and complain of insufficiencies here and there. Where, as here, the "movant" has established, with credible evidence, its loss of market power in the relevant MSAs, the increase in the strength of its competitors, and that its customers' and prospective customers' interests would be advanced by forbearance, the burden of proof must shift to the opposition and/or the Commission to show why forbearance is not warranted. Commissioner Powell advances this very argument in his Dissent, stating that

> [u]pon such a showing, there would be a presumption in favor of forbearance from enforcing the rule or provision in question. Then, the burden would shift to the opponents of forbearance and the Commission (if it seeks to deny the forbearance request) to establish that forbearance would, despite the competitiveness of the market, still not meet the Section 10 criteria.[4]

As support for this approach, Commissioner Powell cites Congress' strong prejudice in favor of competition, as exemplified by the Telecommunications Act itself.[5] He decries the Commission's apparent belief that competition and free markets are "simply regimes that allow firms to profit at the expense of consumers," and counsels that, "History and, more importantly, Congress have judged that competition is a superior device for maximizing consumer welfare."[6]

b. The Commission must Seriously Consider the Evidence and Arguments and Test the Opposition's Case

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[2] Powell Dissent, 1999 FCC LEXIS at *10.
[3] Id.
[4] Powell Dissent, 1999 FCC LEXIS at *12-13.
[5] *See* Powell Dissent, 1999 FCC LEXIS at *10, n.8.
[6] Powell Dissent, 1999 FCC LEXIS at *16-17.

Further, although it is tempting for the Commission to rely on SBC's opponents to counter SBC's arguments, the Commission must not forget that it is the entity charged with responsibility for implementing the Act and furthering its competitive goals. It is not enough for the Commission to grant a cursory reading to SBC's evidence and argument, and then its opponents', and simply deny the petition by stating that SBC has not satisfied some vague burden.[7] Real analysis is required and the lion's share of the scrutiny should be on the opponents' side of the equation, if the Commission is "serious about the protection of the public interest," as Commissioner Powell notes.[8] Because forbearance is the preferred outcome, as is evidenced by the way Congress structured forbearance proceedings, the Commission should expend most of its energy testing the opposition's arguments and evidentiary attacks, rather than asking petitioners "to disprove a hit parade of merely speculative harms while opponents of forbearance seem to be granted the benefit of the doubt."[9]

Several commenters claim, for example, that SBC has not yet proven that its specified markets are competitive. But none has come forward with meaningful evidence of their own. In this case SBC has taken all reasonable steps to prove the existence of meaningful competition. This process is difficult since the competitors are the ones in the best position to explain how many customers they have, where their facilities exist, how fast they have grown, etc. Because SBC can only do so much to prove these points, the burden must shift to the opposition to disprove the market share and other data placed on the record by SBC. If they cannot do this – and it is clear in this case that they have not – SBC's petition must be granted. Such a result is eminently fair to the competitors since they have the evidence (if it exists at all) to show just how many customers they have, where they have built facilities, what their costs are, etc. Since they have refused to place such information on the record, the SBC evidence should stand unrebutted as proof of competition.

c. The Commission must not "Stack the Deck" against a Forbearance Petitioner

This approach would amply respond to Commissioner Powell's concern that the Commission demands a "near-impossible evidentiary standard" of petitioners for forbearance.[10] It is time to stop assuming that BOCs are "bad actors." It is also time to realize that an expectation of "total, ubiquitous, nirvana-like satisfaction"[11] in a given market is unrealistic, particularly in the organic world of the competitive telecommunications industry. SBC urges the Commission to level the playing field by granting its forbearance request and watch competition thrive.

2. The allegations and "advice" of ALTS and Intermedia and the HAI "study" must not derail the Commission's proper resolution of this matter.

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[7] See Southwestern Bell v. FCC, 28 F.3d 165, 172 (D.C. Cir. 1994) ("If an agency can reject an econometric study merely by observing that it employed unproven assumptions (and that the outside party bore the burden of proof), then no party with the burden can ever prevail. '[A]ssigning the burden of proof is not a magic wand that frees an agency from the responsibility of reasoned decision-making.'" [citation omitted]).

[8] Powell Dissent, 1999 FCC LEXIS at *22.

[9] Powell Dissent, 1999 FCC LEXIS at *14.

[10] Powell Dissent, 1999 FCC LEXIS at *13.

[11] Powell Dissent, 1999 FCC LEXIS at *17.

With the above in mind, at a minimum, one must view skeptically what the ILEC competitors are saying:

a. The ALTS statements are entirely self-serving and wrong.

ALTS' request for delay is nothing but a thinly veiled attempt to advance its own self-interests by maintaining the advantages its members enjoy under the current rules. The existing Commission rules provide CAPs and CLECs with a distinct competitive advantage – pricing flexibility. The pricing flexibility ALTS' members enjoy is exactly the pricing flexibility SBC and the other ILECs are requesting. The list of CLEC competitors is lengthy and continues to grow, as does the list of markets they serve. The growth of ALTS is manifestation of this fact.

To suggest that the Commission delay implementing pricing flexibility on the premise that it is premature is preposterous given the availability of alternative transport facilities in the marketplace and the high degree of customer willingness to make use of these facilities. AT&T's multi-billion dollar purchase of TCG and merger agreement and Worldcom's equally substantial investment in its purchase of Brooks and MFS is further evidence of the inroads these companies have made in the marketplace. Customer choice through competition has been an important public policy goal for the Commission but choices in the market place are only the initial step. Competition is supposed to produce the best price achievable in the marketplace and customers are entitled to receive this best price. Establishing the regulatory framework to permit ILECs to flexibly price is a critical step on behalf of customers because it will increase the number of competitive prices in the marketplace which in turn likelihood that customers are receiving the best price achievable in the marketplace.

ALTS argues that collocation is not a valid measure of local competition. But the issue at hand has nothing to do with local competition. Collocation is a valid indicator that competition is present in the dedicated transport market. The former companies mentioned above all collocated prior to their purchase and still do through their new parent companies. They commanded the purchase prices they did due to the investments in their networks, the market share captured and the likelihood of continued prosperity. Significant levels of capacity have been constructed to serve the majority of the dedicated transport market which is the part of the circuit that exists between an IXC POP and an end user serving wire center. Collocation is a definitive, verifiable measure of the existence of this dedicated transport capacity. As a competitive criteria, it is also an extremely conservative measure of competition because, as SBC pointed out in its forbearance petition, CAPs and CLECs have connected numerous buildings to their networks which in no way requires collocation.

b. ALTS' and Intermedia's attempts to tie decisions on pricing flexibility to local competition issues must be rejected.

ALTS members wrongly suggest that the alleged lack of local competition provides a clear indication that pricing flexibility should not be granted for dedicated transport services. Even if one were to accept ALTS' absurd allegation that there is a lack of local competition, the forbearance requested in SBC's petition is specifically limited to dedicated high capacity transport services in specific markets. Intermedia's more general proposal, that decisions on pricing flexibility must take into account the effect on the "development of local competition" is equally fallacious. Competition for dedicated

transport services does not rely upon the presence of local competition. For precisely this reason the Commission was able to promote transport competition through its collocation orders in CC Docket No. 91-141. The dedicated transport services that are the subject of the current forbearance and pricing flexibility discussions are standalone services. CAPs and CLECs are not required to serve the end user for local service as a prerequisite for providing the end user with these dedicated transport services. Intermedia's assertion that pricing flexibility for special access service will work an unreasonably discriminatory "price squeeze" on CLECs using UNE dedicated transport is a blatant attempt to mix apples and oranges. Competition for switched access services (common line and end office switching) on the other hand does rely to a large degree on the presence of local competition, but SBC's petition has not requested forbearance from regulation for the switched access services it provides.

Compelling evidence of the level of competition that exists in the dedicated transport market is represented by the market shares captured by CAPs and CLECs evidence of which is included in SBC's petition for forbearance. The competitiveness of these markets demonstrates the banality of the rhetoric advanced by ALTS and the CLECs.

Furthermore, Intermedia's allegations of different, "discriminatory" standards of performance are out of line. Although the allegations are not ILEC-specific and are too vague to make comprehensive response possible, following are just a few examples of Southwestern Bell performance standards, based upon recent data, that belie Intermedia's accusations.

- In May and June of 1999, there were no SWBT caused missed due dates of more than 30 days.

- The vast majority of CLEC orders for DS1 loops with test access have negotiated -- *longer* -- due dates.

- For CLEC orders using target intervals, 100% were delivered within target in June 1999. SWBT has increasingly improved this performance rate over the past several months.

- Even where SWBT has missed a due date on a DS1 UNE loop, it was by less than 3 days on average for DS1 UNE loops with test access.

c. There is no basis for delaying the Commission's decision on pricing flexibility while consideration continues in other dockets.

The proposition, that delay is appropriate while the Commission further examines a proposal that may be made by joint aIXC/ILEC coalition is again blatantly misleading. The fact that parties are developing proposals to deal with implicit support for Universal Service and to suggest improvements in the interstate access structure is no reason to delay Commission action on pricing flexibility for incumbents in competitive markets. The Commission has been developing a record on pricing flexibility since 1996. Commission action to bring consumers the benefits of a competitive marketplace in which all providers can offer a full range of options is overdue. This is especially true for the special access and dedicated transport marketplace, which is widely acknowledged as the most competitive access marketplace.

d. The HAI paper contains no real data or sound conclusions.

A brief review of the HAI "Study" reveals that it is not a "study" at all, but merely additional argument about why the author believes that the LECs should not be further deregulated. The paper lacks hard data and serious "study"-type findings.

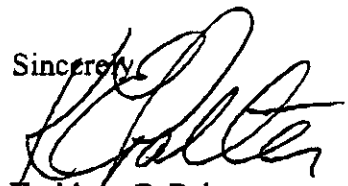
Further, the paper essentially calls for the relevant markets to be measured on a nationwide basis. This approach is wrong. Markets must be measured at no greater a level than the MSA. The manner in which competitors enter a market and other factors, indicate that MSA level measurement is more appropriate.

The paper otherwise attempts to exaggerate the entry barriers, noting for example, that CLECs must in many cases pay building owners for access. The paper ignores the fact that landlords now sometimes insist on such payments from ILECs, too. The paper claims that there are other high costs of construction, but fails to note that ILECs are also subject to most or all of these same costs.

For these reasons, SBC asks the Commission to act favorably in the upcoming open meeting upon SBC's requests for additional pricing flexibility, both in the Access Reform docket, as well as in the docket on its Petition for Forbearance.

Please contact me if you have any questions regarding this correspondence.

Sincerely,



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